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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 800

SUBURBAN TELEPHONE COMPANY, A CORPORATION,
Appellant,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION; ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OF APPELLEE.

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THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The appeal herein by Suburban Telephone Company (hereafter called "Suburban" or "appellant") should not be dismissed for the reasons set forth in the jurisdictional statement and for the following reasons:

I.

THE APPEAL IS WITHIN THE JURISDICTION OF THIS COURT.

The entire history of telephone service in Northern Catron County can be summarized as follows:

	Suburban	Mountain States
	Between Salt Lake and Quemado	Between Datil and Magdalena
1. Commencement of operation of private telephone line	1937 (R. 590)	1953 (R. 332, 369, 530)
2. Purchase of private line by public utility	December 19, 1960 (R. 260)	May 29, 1961 (R. 932-3)
3. Issuance of Catron County franchise	January 3, 1961 (R. 261-5)	None (R. 32)
4. Operation of former private line as a public utility	May 29, 1961 (R. 92)	July 23, 1961 (R. 93, 404)

By every test and by every comparative date, Suburban has preceded Mountain States in Northern Catron County. For any court to hold otherwise is so blatantly arbitrary that on its face it constitutes a taking of Suburban's property without due process of law under the 14th Amendment of the Federal Constitution.

From these simple and basic facts, a court could constitutionally reach only one conclusion: Suburban was the first public utility in the field or territory. If there was any "territory jumping" (Motion to Dismiss, page 21), Mountain States was guilty of it.

The appellant is not asking the Supreme Court to construe the New Mexico statutes but simply to determine whether the action of the New Mexico Supreme Court in

its application of the statutes in this case is in violation of the appellant's federal rights.

The "validity" of a state statute is sustained, within the meaning of § 1257(2), when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282.

II.

THE FEDERAL QUESTIONS WERE TIMELY RAISED.

The appellant raised constitutional questions at the trial level in its requested conclusions of law addressed to the trial judge prior to his decision (R. 89). The appellant further argued constitutional questions in its brief in the Supreme Court of New Mexico prior to that Court's decision (R. 1274-1277). The appellant devoted the major portion of its petition for rehearing to constitutional questions (R. 1386-88) and filed an exhaustive brief on the constitutional questions in support of its petition for rehearing.

Under the circumstances of this case, the appellant has raised federal questions in a timely fashion. It has raised the only federal questions which were apparent at the trial level before the trial court and the only federal questions which were apparent prior to the decision of the New Mexico Supreme Court before that Court rendered its decision. The more comprehensive consideration of the federal questions in the petition for rehearing and the brief in support thereof before the New Mexico Supreme Court were timely in view of the fact that no one anticipated until after the New Mexico Supreme Court had rendered its decision and opinion, that it would take a position

completely inconsistent with its prior decisions in the same area, or that it would, by its decision and opinion, destroy the constitutional rights of the appellant.

If federal questions are created by unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal questions, the petition for rehearing constitutes its first and probably its only chance to present the matter to that court.

Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U. S. 673, 677-8.

Thus, the federal questions here were timely raised and support the exercise of Supreme Court jurisdiction. This is true even though the petition for rehearing was summarily denied without reference to the federal questions.

Great Northern R. Co. v. *Sunburst Oil Co.*, 287 U. S. 358, 366-7;

Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U. S. 673, 677-8;

Ohio ex rel. Bryant v. *Akron Park District*, 281 U. S. 74, 79;

Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313, 320;

Saunders v. *Shaw*, 244 U. S. 317, 320;

Cole v. *Arkansas*, 333 U. S. 196, 200.

The petition for rehearing in the New Mexico Supreme Court and the brief in support thereof have been included in the record filed with the Supreme Court in this case in order to satisfy the requirement that the record affirmatively demonstrate that a federal question was presented to and decided by the state court.

The decision of the New Mexico Supreme Court in this case, in view of the decision of the trial court refusing to

issue any injunction and in view of pertinent past decisions of the New Mexico Supreme Court, was a surprise and could not have been reasonably anticipated from prior decisions.

Herndon v. *Georgia*, 295 U. S. 441.

Under § 1257(2), an appeal will lie even though the state court is not explicit in overruling a challenge on federal grounds to the validity of the state statute.

Largent v. *Texas*, 318 U. S. 418.

As long as the statute is sustained, the court has necessarily rejected such an objection. Its silence in this respect is immaterial and cannot destroy the right to appeal under § 1257(2). Thus an erroneous failure to pass on the federal constitutional objections to the state statute is treated as equivalent to a finding of validity within the meaning of § 1257(2), so that an appeal will lie.

Lawrence v. *State Tax Commission*, 286 U. S. 276, 282-3.

III.

THERE ARE SUBSTANTIAL FEDERAL QUESTIONS.

The Supreme Court will review a state court's findings where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.

Fiske v. *Kansas*, 274 U. S. 380, 385-6;
Creswill v. *Grand Lodge*, 225 U. S. 246, 261;
Sterling v. *Constantin*, 287 U. S. 378, 398.

This Court makes an independent examination of the facts when necessary to decide whether a person has been deprived by a state court of a right secured by the federal Constitution.

Norris v. *Alabama*, 294 U. S. 587, 590;
Chambers v. *Florida*, 309 U. S. 227, 228-9;
Ashcraft v. *Tennessee*, 322 U. S. 143, 147-8;
Craig v. *Harney*, 331 U. S. 367, 373-4;
Niemotko v. *Maryland*, 340 U. S. 268, 271;
Kern-Limerick, Inc. v. *Scurlock*, 347 U. S. 110, 121;
Napue v. *Illinois*, 360 U. S. 264, 271-2.

In the latter two cases, the Court referred to "the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest."

IV.

THE STATE COURT JUDGMENT DOES NOT REST ON ADEQUATE NON-FEDERAL GROUNDS.

The non-federal ground purported to support the state court judgment is untenable. Supreme Court review cannot be evaded by an untenable non-federal ground so unfounded that it is arbitrary and a mere device to prevent a review of the decision upon the federal question.

Enterprise Irrig. Dist. v. *Farmers' Mut. Canal Co.*, 243 U. S. 157, 164;
Ward v. *Love County*, 253 U. S. 17, 22;
Postal Tel. Cable Co. v. *Newport*, 247 U. S. 464, 475-6;
Lawrence v. *State Tax Commission*, 286 U. S. 276, 282.

This court has held that a review of federal questions may not be precluded where a rule of state pleading or procedure has been used arbitrarily.

Davis v. *Wechsler*, 263 U. S. 22, 24;
N. A. A. C. P. v. *Alabama*, 357 U. S. 449, 455-458.

CONCLUSION.

The appeal is within this Court's jurisdiction, federal questions were substantial and were timely raised, and the non-federal basis upon which the state court's judgment rests is not tenable. For these reasons and for those set forth in the jurisdictional statement, the appeal should not be dismissed.

Respectfully submitted,

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